FILED
NOV · 9 1988
JOSEPH E. SPANIOL, JR.
CLERK

No. 88-711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

UNITED TRANSPORTATION UNION,
BURLINGTON NORTHERN RAILROAD COMPANY,

and

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF RESPONDENT RAILWAY LABOR EXECUTIVES' ASSOCIATION IN OPPOSITION TO PETITION

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.*
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500
Attorneys for Respondent Railway Labor Executives' Association

Date: November 9, 1988

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Does the Interstate Commerce Commission, which was an intervenor in the appellate court in a case growing out of a labor dispute, have standing to file a petition for a writ of certiorari where it lacks a personal stake in the outcome of the controversy, where the underlying labor dispute has been resolved, and where the Solicitor General has authorized neither its intervention below nor its petition to this Court?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
JURISDICTION	2
COUNTERSTATEMENT OF THE CASE	2
SUMMARY OF ARGUMENTS	8
REASONS FOR DENYING THE WRIT	9
I. Petitioner ICC Lacks Standing To Ask This Court To Review The Eighth Circuit's Decision Since It Has Not Suffered A Legally Cognizable Injury As A Result Of The Lower Courts' Refusal To Issue A Strike Injunction	9
II. Petitioner ICC Lacks Standing To Ask This Court To Review The Eighth Circuit's Decision Since The Solicitor General Has Not Authorized It To Intervene Below Or To File This Petition	11
III. The Settlement Of The Strike Means That This Case No Longer Presents A Justiciable Issue	12
IV. This Case Does Not Present An Issue Which Warrants Review By This Court At This Time	13
CONCLUSION	14
APPENDICES	
APPENDIX A—RLEA Member Organizations	1a
APPENDIX B—ICC Motion to Intervene	2a

TABLE OF AUTHORITIES

CASES RELIED UPON:	Page
Baker v. Carr, 369 U.S. 186 (1962)	9
Chicago & North Western Transportation Company v. Railway Labor Executives' Association, 855 F.2d 1277 (7th Cir. 1988), *pet. for cert. pending*, Sup. Ct. No. 88-464	6-7
Diamond v. Charles, 476 U.S. 54 (1986)	9, 11
Order of Railroad Telegraphers v. Chicago & North Western Ry., 362 U.S. 330 (1960)	14
Railway Labor Executives' Association v. Pittsburgh & Lake Erie Railroad Company, 831 F.2d 1231 (3rd Cir. 1987), *pet. for cert. pending*, Sup. Ct. No. 87-1589	13, 14
Sosna v. Iowa, 419 U.S. 393 (1975)	13
St. Joe Paper Co. v. Atlantic Coast Line R.R., 347 U.S. 298 (1954)	10
United Transportation Union v. Burlington Northern Railroad Company, 672 F. Supp. 1579 (D. Mont. 1987), *appeal pending*, 9th Cir. No. 87-4386	3
Weinstein v. Bradford, 423 U.S. 147 (1975)	12, 13
Warth v. Seldin, 422 U.S. 490 (1975)	9

STATUTES AND OTHER MATERIALS:	
U.S. CONST., art. III	2, 11
Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*	5
Section 10101a(12), 49 U.S.C. § 10101a(12)	5
Section 10505, 49 U.S.C. § 10505	13
Section 10901, 49 U.S.C. § 10901	14
Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*	10
Section 4, 29 U.S.C. § 104	3, 5, 8, 14
Section 8, 29 U.S.C. § 108	8
Railway Labor Act, 45 U.S.C. § 151, *et seq.*	2, 5, 6, 14
28 U.S.C. § 516	11, 12
28 U.S.C. § 519	12
28 U.S.C. § 1254(1)	2, 9, 12
28 U.S.C. § 2323	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-711

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

UNITED TRANSPORTATION UNION,
BURLINGTON NORTHERN RAILROAD COMPANY,

and

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF RESPONDENT RAILWAY LABOR EXECUTIVES' ASSOCIATION IN OPPOSITION TO PETITION

On October 26, 1988, the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] filed a petition with this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the decision of that court in *Burlington Northern R.R. v. United Transportation Union*, 848 F.2d 856 (8th Cir. 1988). Respondent Railway Labor Executives' Association [hereinafter, "RLEA"] [1] respectfully submits

---

[1] RLEA is an unincorporated association of the Chief Executive Officers of nineteen (19) labor organizations which collectively represent virtually all organized rail employees in this country. A list of RLEA's member organizations is attached hereto as Ap-

that the ICC's petition should be denied, for the ICC lacks standing to invoke this Court's jurisdiction and, even if that agency had standing, this case no longer presents a live case or controversy nor merits review by this Court at this time.

JURISDICTION

Respondent RLEA respectfully submits that this Court does not have jurisdiction under 28 U.S.C. § 1254(1) to grant the writ as requested by the ICC, for several reasons. First, the ICC's interest in this matter is not sufficient to give it standing to seek the writ from this Court. And second, this case no longer presents a live case or controversy as required by Article III of the Constitution of the United States.

COUNTERSTATEMENT OF THE CASE

As petitioner ICC noted in its petition, this case traces its origin to a decision by the Burlington Northern Railroad Company [hereinafter, "BN"] to lease and sell a portion of its rail operations and properties to a newly-formed railroad, Montana Rail Link, Inc. [hereinafter, "MRL"]. Shortly after that transfer of operations appeared imminent, respondent United Transportation Union [hereinafter, "UTU"], two other labor organizations and sixteen (16) individual employees filed a suit with the United States District Court for the District of Montana on July 30, 1987, against respondent BN to enjoin that transfer of rail operations. *UTU v. BN*, D. Mont. Civil Action No. CV-87-73-H-CCL. Several days after that suit was initiated, respondent RLEA filed a complaint with the United States District Court for the Western District of Missouri on August 6, 1987, against respondent BN to enforce the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, which RLEA maintained the BN was violating by transferring rail lines, including the

---

pendix A. Two of those member organizations, the United Transportation Union and the Brotherhood of Locomotive Engineers, are not participating in this response.

MRL line, without first complying with the labor statute's notice, bargaining and status quo requirements. *RLEA v. BN*, W.D.Mo. Civil Action No. 87-0696-CV-W-8. Respondent BN counterclaimed against RLEA and its individual member unions which represented BN employees seeking to enjoin any strike over those sales. On September 18, 1987, that case was consolidated with an earlier action which respondent BN had brought against respondent UTU and another labor organization in 1986 to enjoin a strike over another sale of a BN rail line in 1986; *i.e.*, W.D.Mo. Civil Action No. 86-5013-CV-SW-8.

In October 1987, respondent UTU and the other plaintiffs in the Montana litigation asked that district court to enjoin the transfer of the BN's rail lines to MRL, but on October 29, 1987, the court denied rail labor's request. *UTU v. BN*, 672 F. Supp. 1579 (D.Mont. 1987), *appeal pending*, 9th Cir. No. 87-4386. Even though it concluded that it could not enjoin the transfer of the rail lines, the district court for the District of Montana observed that it might not have jurisdiction by virtue of Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, to enjoin a strike over that transfer of rail lines. 672 F. Supp. at 1582-83 n.3.

Once that decision was issued, respondent BN transferred its rail line to MRL, and the UTU responded by striking the BN. However, rather than asking the district court that had heard and denied the UTU's request concerning the transfer of the rail line, to enjoin a strike over that transfer, respondent BN asked the district court for the Western District of Missouri to prohibit the UTU, as well as all other labor organizations on the BN, from striking. That request was made on October 30, 1987 and was granted; on November 4, 1987, the court extended that Temporary Restraining Order until November 16, 1987. However, respondent BN's request for a preliminary injunction was denied on November 16, 1987, for the court concluded that Section 4 of the Norris-

LaGuardia Act withdrew its jurisdiction to enjoin the UTU's strike.

Respondent BN immediately noted an appeal from that order (subsequently docketed as 8th Cir. No. 87-2600) and sought an injunction from the district court to prohibit a strike pending appeal. That injunction request was granted by the district court; respondent UTU and "all persons acting in concert with" it were enjoined by that order from striking pending the BN's appeal. Respondent UTU on November 25, 1987, filed a notice of appeal from that interlocutory injunction order and that notice was docketed by the Eighth Circuit as 8th Cir. No. 86-2581; thereafter, the two appeals were consolidated. On December 15, 1987, respondent UTU's request for a stay of the injunction pending appeal was heard by a panel of the Eighth Circuit and, after oral argument, the appellate court directed that supplemental briefs be filed by December 29, 1987.

On December 29, 1987, petitioner ICC filed a motion with the Eighth Circuit to intervene in both appeals. According to the ICC, its intervention was proper "because the litigation presents a serious issue affecting the Commission's jurisdiction over transfers and sales of rail property within the nation's rail transportation system." ICC Motion To Intervene in support of BN, App. B at 3a (the ICC's motion to intervene is reproduced herein as Appendix B). Moreover, according to the ICC, its intervention was a matter of right in order "to protect its exclusive and plenary jurisdiction." App. B at 3a-4a. Petitioner ICC did not claim that its right to intervene was conferred by any specific statutory authority, nor did it assert that the Attorney General had authorized it to intervene through its own attorneys. That motion was granted on December 30, 1987.[2]

---

[2] RLEA was not asked whether it would consent to the ICC's intervention before that motion was filed. RLEA, however, did not file an opposition to that motion to intervene, nor did it seek reconsideration of the intervention order.

No further arguments were heard by the Eighth Circuit, and on May 31, 1988, the panel which had heard oral argument on the UTU's motion to suspend the injunction pending appeal, entered its ruling on the merits of both appeals.[3] After noting the purposes of both the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, the court concluded that there was an overlap of the two statutes in the area of rail sales, for, according to the panel, the transportation Act was intended "to prevent labor strife by assuring 'fair wages and working conditions in the railroad industry.'" Pet. at 26a, quoting 49 U.S.C. § 10101a(12). "In these narrow circumstances," the panel stated, "the ICA supersedes the authority of the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping process designed to reach labor protective agreements." Pet. at 26a. Section 4 of the Norris-LaGuardia Act, a majority of the panel concluded, stood on a different footing and was not superseded by the transportation statute. As the majority explained (Pet. at 30a):

> In examining the impetus behind the recent deregulatory efforts in the railroad industry, Congress has sought to free the union-management relationship from time-consuming, "process oriented" bureaucracy imposed by various regulatory statutes and to allow the sagacious invisible hand of the free market economy to reorder rapidly that industry's economic difficulties. Thus, while we agree with BN's contention that enforcing the mandatory bargaining provisions of the RLA might render the changes in

---

[3] RLEA filed an appearance as appellee in the BN's appeal from the denial of its motion for a preliminary injunction; RLEA did not file an appearance in the UTU's appeal from the injunction pending appeal because it viewed that injunction as being ancillary to the BN's appeal and not appealable in its own right. RLEA filed a brief as an appellee in the BN's appeal and a response to the request for rehearing.

> the ICA without much practical force, we find . . . no inherent incompatibility between these actions and Norris-LaGuardia.

The appellate court, with Circuit Judge Fagg dissenting, affirmed the district court's decision denying the BN's request for a preliminary injunction and dissolved the strike injunction pending appeal. Pet. at 31a-32a.

Respondent BN filed a petition for rehearing and a suggestion for rehearing *en banc*, but on September 16, 1988, the panel denied the rehearing request. Also, the suggestion for rehearing *en banc* was denied, for only four of the active Circuit Judges voted to hear the case *en banc*.[4] Pet. at 12a-13a.[5]

Once the court denied the BN's rehearing request, respondent BN sought to continue the strike injunction, first by asking the appellate court to stay the mandate and then, when that request was denied, by asking Justice Blackmun to recall the mandate. That request was denied by Justice Blackmun on October 4, 1988. Sup. Ct. No. A-258, *BN v. UTU*. Respondent BN then filed a motion with the district court for the Western District of Missouri on October 4, 1988, for a preliminary injunction to enjoin a strike by the UTU "and all persons, agents, representatives, organizations, and members acting directly or indirectly on their behalf . . . ." BN Motion, served October 4, 1988, at 2. Respondent BN maintained that the district court could enjoin a strike by the UTU, because the underlying dispute—*i.e.*, whether the BN could sell before it bargained—was a "minor dispute" under the Railway Labor Act. *See, Chicago &*

---

[4] Judge Fagg was not one of the judges who voted for rehearing *en banc*.

[5] Even though the ICC filed a pleading styled a petition for rehearing, the Eighth Circuit's order and amended order denying rehearing did not reflect that the court considered the ICC to have made such a request. Pet. at 12a-13a.

North Western Transportation Co. v. RLEA, 855 F.2d 1277 (7th Cir. 1988), *pet. for cert. pending*, Sup. Ct. No. 88-464.

That motion was heard by the district court on October 4, 1988, but no decision was entered. Instead, the parties were directed to report to the court on October 11, 1988 concerning "the status of negotiations" between BN and UTU and whether a strike was imminent. Order of district court dated October 6, 1988 in W.D. Mo. Nos. 86-5013-CV-SW-8 and 87-0696-CV-W-8. On October 11, 1988, respondents BN and UTU informed the district court that they had "reached a tentative agreement" concerning the "effect on UTU employees" from the MRL transfer, and "if details can be finalized are hopeful that a final agreement can be reached soon." Joint Status Report filed October 11, 1988, at 2. Respondents BN and UTU stated further: "Because of the status of this matter, UTU will not authorize a strike." *Id.*

A subsequent status report was filed with the district court by the BN, UTU, RLEA and the Brotherhood of Locomotive Engineers on November 1, 1988. In that status report, the Court was informed that:

> Burlington Northern and United Transportation Union, who had arrived at an agreement in principle prior to the last oral status report, believe they have now arrived at an agreement upon all or most of the details of a compromise of their dispute relating to Montana Rail Link. The parties [*i.e.*, BN and UTU] are circulating a written proposal spelling out the details of their compromise agreement and hope to have same agreed upon in final form and fully executed by November 10, 1988.

Joint Status Report filed November 1, 1988 at 2. The parties further informed the court that: UTU "has agreed not to take any strike action prior to 00001 A.M. November 12, 1988, pending and in anticipation of the proposed voluntary compromise." *Id.*

Counsel for RLEA has been informed that the agreement has been reached and signed by both parties and that part of the final agreement requires both BN and UTU "to withdraw and dismiss with prejudice all claims, complaints, appeals, demands and lawsuits which in any way contest the legality, effect or impact of BN's sale and lease of trackage to MRL." Settlement Agreement and Release, signed November 3, 1988, at Art. VI.[6] In particular, the BN and UTU (*id.*):

> [W]ill withdraw and dismiss with prejudice any claims or causes of action concerning BN's sale and lease of trackage to MRL that are pending in *Railway Labor Executives' Association v. Burlington Northern Railroad Company v. RLEA, et al.*, No. 87-0696-CV-W-8 consolidated with No. 86-5013-CV-SW-8; [and] any further appeals from *Burlington Northern Railroad Company v. UTU*, Nos. 87-2581 WM and 87-2600 WM (8th Cir. 1988) . . . .

In the meantime, the ICC filed this petition with this Court. However, the Solicitor General has not authorized that agency to file this petition. *See*, Brief for United States as Amicus Curiae at 19 n.16 in Sup. Ct. Nos. 87-1589 and 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*.

SUMMARY OF ARGUMENTS

Petitioner ICC is an unauthorized interloper in the labor dispute which was before the Eighth Circuit. That dispute arose out of a controversy concerning a railroad's obligation to bargain with rail labor and involved the issue of whether Sections 4 and 8 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 108, withdrew jurisdiction from the federal courts to enjoin, at BN's request,

---

[6] Counsel for RLEA has been informed that this agreement has been signed by both parties, but at present has been provided solely with a copy of the agreement signed by the UTU. Therefore, RLEA cannot state with absolute assurance that the agreement has been finalized. Counsel will continue to attempt to verify the status of the settlement and will inform the Clerk's office of any change.

a strike arising out of that controversey. Petitioner ICC is interested in that dispute solely because of its incidental effect on the BN's willingness to transfer rail lines which are the subjects of ICC orders, and thus, the Commission does not have a sufficient interest in this dispute to give it standing to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1). Moreover, the ICC lacks standing to invoke this Court's jurisdiction since the Solicitor General has not authorized the Commission to file this petition or to intervene below. But even if it were assumed *arguendo* that the ICC had standing below, the settlement of the controversy which had led to the UTU's strike means that this proceeding no longer presents a live case or controversy. And finally, the issue presented by this case does not warrant review by this Court at this time.

REASONS FOR DENYING THE WRIT

I. Petitioner ICC Lacks Standing To Ask This Court To Review The Eighth Circuit's Decision Since It Has Not Suffered A Legally Cognizable Injury As A Result Of The Lower Courts' Refusal To Issue A Strike Injunction

It is axiomatic that this Court does not have jurisdiction to issue advisory opinions, but rather, may act only in cases which present an actual "case or controversy." *E.g., Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). One aspect of this constitutional limitation on this Court's jurisdiction is the "constitutional dimension" of the standing requirement which requires the person invoking this Court's jurisdiction to show " 'such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." 422 U.S. at 498-99, *quoting Baker v. Carr*, 369 U.S. 186, 204 (1962) (emphasis in original). In this case, RLEA respectfully submits, the ICC lacks such a personal stake in this controversy as to warrant its invocation of this Court's jurisdiction. *Diamond v. Charles*, 476 U.S. 54 (1986).

Petitioner ICC informed the court of appeals that it needed to intervene because the issue involved in this case—*i.e.*, whether a federal court, notwithstanding the strictures of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, could enjoin a strike in a labor dispute arising from a refusal of a railroad to bargain over the impact on employees of a sale or other transfer of rail assets subject to the regulatory jurisdiction of the ICC—presented a "serious issue affecting the Commission's jurisdiction over transfers and sales of rail property within the nation's rail transportation system." App. B at 3a.

While the ICC may have been concerned about the impact which the issue presented to the appellate court might have on its ability to discharge its responsibilities, the actual case or controversy in which that issue arose did not involve the ICC directly, nor did it involve either a direct or even an arguable collateral attack on an ICC order. Here, the BN did transfer its rail properties to MRL and that transfer was completed before the litigation arrived in the appellate court. Thus, the strike cannot be viewed as threatening the consummation of the transfer exempted from regulation by the ICC exemption order. Moreover, since the ICC did not, and still does not, have the power to compel the BN to transfer its rail lines pursuant to an exemption (*accord*, *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298 (1954)), whether or not the UTU can use its non-judicial, economic powers to persuade the BN to reconsider the terms of, or even its decision to transfer its properties to MRL, cannot be viewed as a "collateral attack" on the ICC's exemption. Surely, therefore, the question of whether federal courts have jurisdiction to enjoin such a strike cannot be viewed as presenting a collateral attack on the ICC's exemption. In short, since no order of the ICC was attacked either directly or collaterally, the ICC lacked a personal stake in the outcome of this controversy of a degree which would give it standing to seek to enjoin the UTU's previously threatened strike.

Petitioner ICC cannot overcome its lack of standing by asserting that its status as an intervenor before the court of appeals allows this Court to dispense with the standing requirement, or stated another way, its role as an intervenor *a fortiori* satisfies the standing requirement. In *Diamond v. Charles*, *supra*, this Court addressed a comparable automatic standing assertion and stated: "Although intervenors are considered parties entitled, among other things, to seek review by this Court, . . . an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." 476 U.S. at 68. Here, the BN has not, and, this Court has been informed, will not file its own petition for a writ of certiorari in this case. *See*, Letter of Counsel for BN to this Court, dated November 8, 1988, in No. 88-711. Consequently, the ICC cannot rely upon the BN's standing to give this Court Article III jurisdiction. And since the ICC lacks constitutional standing on its own, its petition does not present a justiciable case or controversy.

II. Petitioner ICC Lacks Standing To Ask This Court To Review The Eighth Circuit's Decision Since The Solicitor General Has Not Authorized It To Intervene Below Or To File This Petition

In its petition, the ICC notes that its authority to intervene below and its status as a proper party before this Court may be raised as an issue in this case. Pet. at 10. That prediction is accurate, for RLEA is raising that question.

Respondent RLEA notes that the Solicitor General has informed this Court that he did not authorize the Commission to intervene before the Eighth Circuit or to file its petition with this Court. Brief for United States as Amicus Curiae in Nos. 88-1589 and 87-1888, *supra*, at 19 n.16. Consequently, the ICC does not have standing to invoke this Court's jurisdiction, for 28 U.S.C. § 516 gives the Attorney General the responsibility to conduct

"litigation in which the United States, [or] an agency . . . is a party, or is interested . . . ." 28 U.S.C. § 516. Moreover, 28 U.S.C. § 519 gives the Attorney General the authority to "supervise all litigation to which the United States, [or] an agency . . . is a party . . . ." 28 U.S.C. § 519.

Those general provisions apply and preclude unauthorized intervention or participation by the ICC unless that participation is "otherwise authorized by law." 28 U.S.C. §§ 516, 519. Here, however, the ICC's participation is not "otherwise authorized" by any statute, for the statutory provision upon which the ICC has primarily relied, 28 U.S.C. § 2323, at best authorizes the ICC to appear "in any action involving the validity of" an ICC order.[7] 28 U.S.C. § 2323. A suit to enjoin a strike does not involve the validity of an ICC exemption.

Since the Solicitor General has not authorized the ICC to participate before the Eighth Circuit or to file its petition in this proceeding, the Commission lacks standing to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

III. The Settlement Of The Strike Means That This Case No Longer Presents A Justiciable Issue

At present it appears that the UTU has reached an agreement with the BN over the specific transfer of BN rail lines which led to the strike that was the subject of the litigation in which the ICC intervened. That agreement means that there is no longer a strike threat in this case and, thus, this case no longer presents a live case or controversy. *E.g.*, *Weinstein v. Bradford*, 423 U.S. 147 (1975).

Petitioner cannot escape the mootness of this case by asserting that the situation presented here is "capable of

---

[7] RLEA submits that § 2323 does not authorize ICC intervention in collateral attack cases. *See*, Brief for RLEA in Opposition To Petition in No. 88-217, *ICC v. Pittsburgh & Lake Erie R.R.*, at 6-7.

repetition, yet evading review," for the continued viability of *RLEA v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3rd Cir. 1987), *pet for cert. pending*, Sup. Ct. No. 87-1589, shows that the challenged action is not of such a limited duration that its validity cannot be "fully litigated prior to its cessation or expiration . . . ." *Weinstein v. Bradford*, *supra*, 423 U.S. at 149. As this Court stated in *Sosna v. Iowa*, 419 U.S. 393, 402 (1975):

> In cases in which the alleged harm would not dissipate during the normal time required for resolution of the controversy, the general principles of Art. III jurisdiction require that the plaintiff's personal stake in the litigation continue throughout the entirety of the litigation.

As shown above, the ICC never had a judicially cognizable personal stake in the outcome of this case. But even if it did, that personal stake surely ended when the UTU settled with the BN and no longer threatened to strike over the completed MRL transaction. Consequently, the Commission's exemption order cannot be said to be endangered and, therefore, its petition in this case presents only an academic issue.

IV. This Case Does Not Present An Issue Which Warrants Review By This Court At This Time

This case presents essentially the same issue as presented by No. 87-1589, *Pittsburgh & Lake Erie R.R. v. RLEA*, in which RLEA has filed a response acknowledging the importance of the issue, but asserting that the issue need not be reviewed by this Court at this time for several reasons. RLEA continues to maintain that its response to No. 87-1589 is correct, and that there is no need for this Court to review the specific accommodation question presented by both No. 87-1589 and this petition at this time.

First, there is no conflict among the circuits on the conclusion that an ICC exemption order under 49 U.S.C. § 10505 of a sale of a rail line which, but for that exemp-

tion, would have been subject to regulation by the ICC under 49 U.S.C. § 10901, does not restore to the federal courts the equity jurisdiction which Section 4 of the Norris-LaGuardia Act has withdrawn. Moreover, the lower courts' conclusion on this point is entirely consistent with the anti-injunction Act, its legislative history, and prior decisions by this Court such as *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960). And finally, the need to strike occurs in these line sale cases only because the carriers refuse to bargain and to maintain the status quo during that bargaining process. If this Court concludes that the Railway Labor Act requires a carrier both to bargain and to maintain the status quo, then there will be no need to address the Norris-LaGuardia Act issue because there should be no strikes. However, unlike No. 87-1589, in which RLEA suggested that the Court withhold acting on that petition until the underlying conflict of laws issue was resolved, RLEA submits that there is no need to defer action on this petition because of the standing and mootness problems.

CONCLUSION

For the reasons set forth herein, respondent RLEA respectfully submits that this Court should deny the ICC's petition.

Respectfully submitted,

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.*
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500
Attorneys for Respondent Railway Labor Executives' Association

Date: November 9, 1988

* Counsel of Record

APPENDICES

APPENDIX A

Railway Labor Executives' Association
Member Organizations

American Railway & Airway Supervisors Association (Division of TCU);

American Train Dispatchers Association;

Brotherhood of Locomotive Engineers;

Brotherhood of Maintenance of Way Employes;

Brotherhood of Railroad Signalmen;

Brotherhood Railway Carmen (Division of TCU);

Hotel Employees and Restaurant Employees International Union;

International Association of Machinists and Aerospace Workers;

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers;

International Brotherhood of Electrical Workers;

International Brotherhood of Firemen & Oilers;

International Longshoremen's Association;

National Marine Engineers' Beneficial Association;

Railroad Yardmasters of America (Division of UTU);

Seafarers International Union of North America;

Sheet Metal Workers' International Association;

Transport Workers Union of America;

Transportation•Communications Union (TCU); and

United Transportation Union.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2600WM

BURLINGTON NORTHERN RAILROAD CO.
Appellant

v.

UNITED TRANSPORTATION UNION
Appellee

No. 87-2581WM

UNITED TRANSPORTATION UNION
Appellant

v.

BURLINGTON NORTHERN RAILROAD CO.
Appellee

[Filed December 29, 1987]

[Granted, December 30, 1987]

MOTION OF THE INTERSTATE COMMERCE COMMISSION TO INTERVENE IN SUPPORT OF THE APPELLANT IN NO. 87-2600WN AND APPELLEE IN NO. 8-2581WM

These appeals raise the issue of whether the Norris La Guardia Act, 29 U.S.C. § 101 *et. seq.* (NLGA) withdraws jurisdiction from the courts to enjoin a strike designed to block the consummation of a transfer of rail properties previously authorized by the Interstate Commerce Commission (Commission) pursuant to the Interstate Commerce Act. 49 U.S.C. § 10101 *et. seq.* (ICA). The United Transportation Union (UTU) appellant in Docket No. 87-2581WM seeks to reverse a district court order granting an injunction pending appeal. BN, appellant in Docket No. 87-2600WM, seeks an order reversing the district court's order denying BN's request for a preliminary injunction against a threatened strike of BN by UTU.

The Interstate Commerce Commission, by and through its undersigned attorneys, hereby moves to intervene in support of the appellant in No. 87-2600WM and appellee in No. 87-2581WM pursuant to rule 27 Federal Rules of Appellate Procedures. The Commission should be authorized to intervene because the litigation presents a serious issue affecting the Commission's jurisdiction over transfers and sales of rail property within the nation's rail transportation system. Any resolution that holds the NLGA superior to the ICA impinges on the Commission's ability to administer the Act and denies to the Commission the exclusive and plenary jurisdiction over all aspects of the sale or transfer of rail properties confirmed upon it by Congress. The exclusive and plenary nature of the Commission's authority has been held to override the provisions of the NLGA to the extent necessary to carry into effect the order of the Commission permitting the transaction. *Missouri Pacific R.R. Co. v. UTU*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 3209 (1987). See also *BLE v. Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir.) *cert. denied*, 375 U.S. 819 (1963).

The Commission must be allowed to intervene as a matter of right to protect its exclusive and plenary juris-

diction. *Cf. Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, (D.C. Cir. 1984). Rule 24(a)(2) Federal Rule of Civil Procedure, the basic standard for granting intervention, permits intervention of right "when the applicant claims an interest relating to the . . . transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." *Liddel v. Caldwell*, 546 F.2d 768, 700 (8th Cir. 1976) *cert. denied sub nom. St. Louis Board of Education v. Caldwell*, 433 U.S. 14, (1977). The UTU's position strikes at the heart of the ICC authority over the sale of rail lines in this country—authority given to the Commission by Congress as an aid to the Commission's implementation of the National Transportation Policy and the ICC's operating statutes.

Only full intervention will permit the Commission adequately to protect its interests in these proceedings. Further, the rule governing intervention is to be liberally construed. Any doubt should be resolved in favor of allowing intervention. *Arkansas Electric Energy Consummers v. Middle South Energy Co.*, 772 F.2d 401 (8th Cir. 1985). See *Trbovich v. United Marine Workers of America*, 404 U.S. 528, 538 fn.10 (1971) where the court announced that the rule is satisfied if the applicant shows that representation of his interest may be inadequate; and the burden of making that showing should be treated as minimal.

The Commission's interests in this litigation differ from those of the private parties. The Commission claims exclusive and plenary jurisdiction over the transaction at issue here. The ICC has a legitimate interest in protecting its claim which entitles the agency to intervention, *Newport News Shipbuilding & Drydock Co. v. Peninsula Shipbuilders*, 646 F.2d 117, 121 (4th Cir.

1981). In any event, the Commission is the only person before the court charged with protecting the public in connection with authorizing the transaction out of which the instant litigation arose. Finally, only full intervenor status will afford the Commission the right to appeal any adverse decision by this court.

CONCLUSION

For the foregoing reasons, the motion of the Interstate Commerce Commission to intervene should be granted.

Respectfully submitted,

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

/s/ Clyde J. Hart, Jr.
CLYDE J. HART, JR.
Attorney
Interstate Commerce Commission
12th & Constitution Ave., N.W.
Room 5211
Washington, D.C. 20423
(202) 275-1851

[Certificate of Service Omitted in Printing]